THE

LAW OF COSTS

IN

CIVIL ACTIONS.

1793

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By WILLIAM TIDD,
Of the INNER TEMPLE.

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PREFACE.

THE following ſheets were intended to have made part of the *Practice of the Court of King's Bench:* but the importance of the ſubject ſeeming to require a diſtinct inveſtigation, the Author was induced to publiſh them in their preſent form.

In this treatiſe, he has briefly conſidered, in what caſes the parties

parties in a civil action are entitled to coſts, what thoſe coſts are, and the means of taxing and recovering them, 1. as between party and party; and 2. as between attorney and client.

Short as the work is, the Author is not without his hopes, that it may be of ſome utility to the Profeſſion.

Inner Temple,
Nov. 1792.

ANALYSIS.

Coſts,

Coſts,

Law of Coſts.

IN the proſecution and defence of *civil* actions, for it is not my intention to treat of *criminal* proceedings, the parties are neceſſarily put to certain expences, or, as they are commonly called, *Coſts*; conſiſting of money paid to the king, for fines and ſtamp-duties, to the officers of the court, and to the counſel and attornies, for their fees, *&c.*

Theſe coſts may be conſidered either as between *attorney* and *client*, being what are payable in every caſe to the attorney by his client, whether he ultimately ſucceed or not; or as between *party* and *party*, being thoſe only which are allowed, in ſome particular caſes, to

the party ſucceeding againſt his adverſary. As between party and party, they are *interlocutory* or *final*; the former are given on various *interlocutory* motions and proceedings, in the courſe of the ſuit; the latter, of which I ſhall principally treat, are not allowed till the concluſion of it.

Of the *plaintiff*'s coſts at common law, and by the ſtatute of Glouceſter.

No coſts were recoverable by the plaintiff or defendant at common law [a]. But by the ſtatute of Glouceſter, (6 Edw. 1.) c. 1. § 2. it is provided, "that the demandant may recover againſt the tenant the coſts of his *writ* purchaſed (which, by a liberal interpretation, has been conſtrued to extend to the *whole* coſts of his ſuit [b]), together with the damages given by that ſtatute; *and that this act ſhall hold place, in all caſes where a man recovers damages.*" This was the origin of coſts *de incremento* [c]. And hence the plaintiff has, generally ſpeaking, a right to coſts, in all caſes where he was entitled to

[a] 2 Inſt. 288. Hardr. 152.
[b] 2 Inſt. 288. [c] Gilb. Eq. Rep. 195.

damages,

damages, antecedent to, or by the proviſions of, the ſtatute of Glouceſter [d]; as in *aſſumpſit*, covenant, debt on contract, caſe, treſpaſs, replevin, ejectment, *&c.*; or where, by a ſubſequent ſtatute, *double* or *treble* damages are given, in a caſe where *ſingle* damages were before recoverable [e]; as upon the 2 Hen. 4. c. 11. for ſuing in the admiralty court [f], upon the 8 Hen. 6. c. 9. for a forcible entry [g], or upon the 2 & 3 W. & M. ſeſſ. 1. c. 5. for reſcuing a diſtreſs for rent [h]. And he has alſo a right to coſts, in all caſes where a certain *penalty* is given by ſtatute to the party grieved [i]; for otherwiſe the remedy might prove inadequate.

But the ſtatute of Glouceſter did not extend to caſes where *no* damages were

[d] 10 Co. 116. a. [e] *Id.* 2 Inſt. 289. Cowp. 368.
[f] 10 Co. 116. a. b. Dyer, 159. b. Carth. 297.
[g] 10 Co. 115. b. Co. Lit. 257. b. 2 Inſt. 289. Cro. El. 582.
[h] Carth. 321. 1 Salk. 205. 1 Ld. Raym. 19. Skin. 555. Holt, 172. S. C.
[i] Cro. Car. 560. 1 Roll. Abr. 574. Skin. 363. Carth. 230. 1 Salk. 206. 1 Ld. Raym. 172. Say. Coſts, 11. H. Black. 10.

recoverable at common law, as in *ſcire facias*, *prohibition* [k], &c.; nor where *double* or *treble* damages were given by a ſubſequent ſtatute, in a new caſe where *ſingle* damages were not before recoverable; as in *waſte* againſt tenant for life or years [l], upon the ſtatute of Glouceſter, (6 Edw. 1.) c. 5; for not ſetting out tithes [m], upon the 2 & 3 Edw. 6. c. 13; or for driving a diſtreſs out of the hundred [n], upon the 1 & 2 Ph & M. c. 12. Nor does this ſtatute extend to *popular* actions, where the whole or part of a penalty is given by ſtatute to a common informer [o]; as, upon the 5 Eliz. c. 4. § 31. for exerciſing a trade, without having ſerved an apprenticeſhip; or upon the ſtatute of uſury, 12 Ann. ſtat. 2. c. 16. In theſe and ſuch like caſes, therefore,

[k] Comb. 20.

[l] 2 Hen. 4. 17. 9 Hen. 6. 66. b. 10 Co. 116. b. 2 Inſt. 289.

[m] Moor, 915. Noy, 136. Hardr. 152.

[n] 2 Inſt. 289. Dyer, 177. But ſee Cro. Car. 560. 1 Roll. Abr. 574.

[o] 1 Roll. Abr. 574. 1 Vent. 133. Carth. 231. 1 Salk. 206. 1 Ld. Raym. 172. Caſ. Pr. C. B. 87. Barnes, 124. S. C. Cowp. 366. H. Black. 10. B. N. P. 333.

the

the plaintiff is not entitled to coſts, unleſs they are expreſsly given him by the ſtatute; but wherever they are ſo given, he is of courſe entitled to them.

Where *ſingle* damages are given by a ſtatute, ſubſequent to the ſtatute of Glouceſter, in a new caſe wherein no damages were previouſly recoverable, it has been doubted whether the plaintiff ſhall recover coſts, if they are not mentioned in the ſtatute. The rule in *Pilfold*'s caſe is, that he ſhall not [p]; and accordingly it is holden, that he is not entitled to coſts in *quare impedit* [q], wherein damages are given by the ſtatute of Weſtm. 2. (13 Edw. 1.) c. 5. § 3. But the rule in *Pilfold*'s caſe is contradicted by lord *Coke* himſelf [r], who ſays, that "this clauſe (reſpecting the ſtatute of Glouceſter's holding place, in all caſes where a man recovers damages) doth extend to give coſts, where damages are

[p] 10 Co. 116. a.

[q] 2 Hen. 4. 17. 27 Hen. 6. 10. 10 Co. 116. a. 2 Inſt. 289. 362. Barnes, 140. And ſee Cro. Car. 360. Carth. 231. Cowp. 367, 8.

[r] 2 Inſt. 289.

given to any demandant or plaintiff, in any action, by any ſtatute made *after* this parliament." And the rule has been ſince narrowed, by ſeveral modern deciſions; from whence it may be collected, that the plaintiff is entitled to coſts, in all caſes where ſingle damages are given by ſtatute to the party grieved[s], although coſts are not particularly mentioned in the ſtatute.

Of the coſts in *waſte*, *debt* for not ſetting out *tithes*, *ſcire facias*, and *prohibition*.

In ſeveral of the foregoing caſes, wherein coſts were not recoverable by the plaintiff at common law, they are expreſsly given him by the ſtatute 8 & 9 W. 3. c. 11. by which it is enacted, that "in all actions of *waſte*, and actions of debt upon the ſtatute for not ſetting forth *tithes*, wherein the ſingle value or damage found by the jury ſhall not exceed the ſum of twenty nobles; and in all ſuits upon any writ or writs of *ſcire facias*, and ſuits upon *prohibitions*, the

[s] 2 Wilſ. 91. Barnes, 151. S. C. 3 Bur. 1723. 1 T. R. 71. But ſee the opinion of *Aſton*, Juſt. *cont.* Cowp. 367, 8.

plaintiff

plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, ſhall likewiſe recover his coſts of ſuit; and if the plaintiff ſhall become nonſuit, or ſuffer a diſcontinuance, or a verdict ſhall paſs againſt him, the defendant ſhall recover his coſts, and have execution for the ſame by *capias ad ſatisfaciendum*, *fieri facias*, or *elegit*."

Upon this ſtatute there have been the following determinations:

In an action of debt for the *penalty* of the ſtatute 2 & 3 Edw. 6. c. 13. for not ſetting out tithes, with a count for the *ſingle* value, after a demurrer to the declaration the parties ſubmitted to arbitration, and the arbitrator awarded the ſingle value to be leſs than twenty nobles (6l. 13s. 4d.); the court held, that the plaintiff was not entitled to coſts on the counts for the penalty, under the ſtatute 8 & 9 W. 3. c. 11. the value not having been found by the jury; but

they allowed him to have the coſts taxed, on the count for the ſingle value [t].

In *Scire facias*, the plaintiff is not entitled to coſts, unleſs the defendant has appeared and pleaded: And no coſts are payable by the plaintiff, on moving to quaſh his own writ before plea [u], nor after a plea in abatement [v].

In *Prohibition*, the rule is, that the plaintiff, ſucceeding after plea pleaded or demurrer joined, ought to have his coſts from the time of the ſuggeſtion, or firſt motion for a prohibition, and all coſts incident and ſubſequent thereto [w]. And where the defendant pleaded nothing to the merits, but only that he did not proceed in the ſpiritual court after the prohibition, the court held this not to be a plea within the ſtatute, but a mere ſham plea, and ordered the defendant to pay

[t] H. Black. 107. And ſee Barnes, 150.
[u] Caſ. Pr. C. B. 74.
[v] 1 Str. 638.
[w] Caſ. Pr. C. B. 11. 1 Str. 82. 2 Str. 1062.

the

the plaintiff's coſts of the proceedings in prohibition [x]. Where the defendant in prohibition lets judgment go by default, the plaintiff is entitled, by the common law, to a writ to inquire of his *damages*, for the contempt in proceeding after the prohibition delivered; and, of conſequence, by the ſtatute of Glouceſter, to his *coſts* [y]. In this caſe, however, the plaintiff is only entitled to coſts, from the time that the rule for a prohibition was made abſolute, as the defendant could not poſſibly be in contempt before [z]. And where the plaintiff was nonſuited, it was holden, that the defendant ought only to have the coſts of the nonſuit, and not what were incurred by oppoſing the rule to ſhew cauſe, why the writ of prohibition ſhould not be granted [a]. If judgment be given for the plaintiff, as to *part* of what is in iſſue, he is entitled to coſts, although a conſultation be granted as to the reſidue [b]. And, in like manner, if the defendant

[x] Barnes, 148.
[y] Caſ. Pr. C. B. 20.
[z] Id. 21.
[a] Say. Coſts, 137.
[b] 2 Str. 1062, 3.

prevail

prevail as to *part*, he is entitled to coſts [c]. But it ſeems, that if the defendant ſucceed upon demurrer, he is not entitled to coſts [d], this being a *caſus omiſſus* out of the ſtatute. There is a proviſo in the ſtatute [e], that it ſhall not extend to executors or adminiſtrators; and hence it has been determined, that in *ſcire facias* [f] or *prohibition* [g], they are not liable, when plaintiffs, to the payment of coſts.

Of the ſtatutes reſtraining the plaintiff's right to coſts.

The plaintiff's general right to coſts being thus ſettled and eſtabliſhed, upon the footing of the ſtatute of Glouceſter, has been ſince altered, reſtrained, and modified, by ſubſequent ſtatutes. The firſt ſtatute that reſtrained the plaintiff's right to coſts, was the 43 Eliz. c. 6. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 W. 3. c. 9.); by which it is enacted, that "if in any perſonal action, to be brought in any of her majeſty's courts of Weſtminſter, not being for any

[c] Barnes, 138, 139.
[d] *Brymer* and *Atkyns*, H. 29 G. 3. C. B.
[e] § 5. [f] 1 Str. 188.
[g] Caſ. Pr. C. B. 158. Pr. Reg. 118. Barnes, 127. 129. S. C.

title

title or intereſt of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it ſhall appear to the judges of the ſame court, and be ſo ſignified by the juſtices before whom the ſame ſhall be tried, that the debt or damages to be recovered therein ſhall not amount to the ſum of forty ſhillings, that in every ſuch caſe the judges or juſtices, before whom ſuch action ſhall be purſued, ſhall not award to the plaintiff any more coſts than the ſum of the debt or damages ſo recovered ſhall amount to, but leſs at their diſcretion." The intention of this ſtatute was to confine trifling actions to inferior courts [h]; and a certificate may be granted upon it, at any time after the trial of the cauſe [i]. The firſt inſtance of a certificate being granted, upon this ſtatute, was in the caſe of *White* v. *Smith*, E. 17 G. 2.; wherein *Willes* Ch. J. certified in an action for taking ſand [k]. And ſince that time, cer-

[h] Gilb. Eq. Rep. 196.
[i] Say. Coſts, 18. 3 T. R. 38. *(d)*.
[k] 2 Str. 1232. 1 Wilſ. 93. S. C. 3 Wilſ. 325.

tificates have been not infrequent[1]. But as the judges, for a long time, were unwilling to certify upon this ſtatute, thinking it hard to deprive a plaintiff of his right to coſts, merely becauſe he had reſorted to a ſuperior court, when perhaps he could not have obtained juſtice in an inferior one, the legiſlature was obliged to interpoſe its authority, ſtill farther to guard againſt trifling and vexatious actions.

Of the court of *conſcience* acts.

Thus, by the 3 Jac. 1. c. 15. § 4. it is enacted, that " if in any action of debt, or action upon the caſe upon an *aſſumpſit* for the recovery of any debt, to be ſued or proſecuted againſt any citizen and freeman of the city of *London*, or any other perſon, being a victualler, tradeſman, or labouring man, inhabiting within the ſaid city or the liberties thereof, in any of the king's courts at Weſtminſter, or elſewhere, out of the court of requeſts for the ſame city, it ſhall appear to the judge or judges of

[1] Id. Say. Rep. 250. 2 Wilſ. 253. 3 T. R. 37.

the

the court where ſuch action ſhall be ſued or proſecuted, that the debt to be recovered by the plaintiff ſhall not amount to the ſum of forty ſhillings, and the defendant ſhall duly prove, either by ſufficient teſtimony or his own oath, that at the time of commencing ſuch action, the defendant was inhabiting and reſiant in the city of *London* or the liberties thereof, the ſaid judge or judges ſhall not allow to the plaintiff any coſts of ſuit, but ſhall award the plaintiff to pay ſo much ordinary coſts to the defendant, as the defendant ſhall juſtly prove, before the ſaid judge or judges, it hath truly coſt him in defence of the ſuit." Which ſtatute has been ſince extended, by the 14 Geo. 2. c. 10. to " *every* citizen and freeman of the city of *London*, and every other perſon and perſons inhabiting within the ſaid city or its liberties, and alſo to perſons renting or keeping any ſhop, ſhed, ſtall, or ſtand, or ſeeking a livelihood there, who have debts owing them, not exceeding the ſum of forty ſhillings, by any perſon or perſons inhabiting or ſeeking a livelihood

hood within the ſaid city or its liberties, during their reſpective inhabitancy or ſeeking a livelihood as aforeſaid."

And towards the latter end of the laſt reign, ſeveral acts of parliament were made, eſtabliſhing courts of conſcience in various diſtricts, in and about the metropolis; as in the town and borough of *Southwark*, &c. by the 22 Geo. 2. c. 47.; in the city and liberty of *Weſtminſter*, and part of the dutchy of *Lancaſter*, by the 23 Geo. 2. c. 27. (explained and amended by the 24 Geo. 2. c. 42.); and in the *Tower-hamlets*, by the 23 Geo. 2. c. 30. And by the 23 Geo. 2. c. 33. the county court of *Middleſex* was put on a different footing, for the more eaſy and ſpeedy recovery of ſmall debts.

In theſe acts of parliament there are exceptions, reſpecting the *cauſes* and *perſons*, of which and over whom the courts are to have juriſdiction. Thus, in the 7 Jac. 1. c. 15. there is an exception or proviſo[m], that "it ſhall not extend to any

[m] § 6.

debt

debt for *rent* upon any leaſe of lands or tenements, or any other real contracts, nor to any other debt that ſhall ariſe by reaſon of any cauſe concerning a teſtament or matrimony, or any thing concerning or properly belonging to the eccleſiaſtical court, although the ſame be under forty ſhillings." And there is a ſimilar exception in the court of conſcience act for the *Tower-hamlets* [n]; which exception has been conſtrued to apply to an action for uſe and occupation [o]. And it is a conſtant and invariable rule, that none of the court of conſcience acts extend to caſes, where the ſum recovered is reduced under forty ſhillings, by means of a ſet-off [p], or tender [q]. Reſpecting *perſons*, the court in one inſtance permitted a ſuggeſtion to be entered on the roll, in an action brought by an *adminiſtrator* [r]. But in an action brought againſt an *executor*, they refuſed it [s]; ſaying, it could not be meant to give the court of conſcience a juriſdiction

[n] Doug. *oct.* 245. [o] Id. 244.
[p] 2 Str. 1191. 1 Wilſ. 19. S. C. 2 Wilſ. 68. 3 Wilſ. 48.
[q] Doug. *oct.* 448, 9. [r] Id. 246. [s] Id. 263.

over

over executors; and that if there was no expreſs exception, there was one implied from the nature and reaſon of the thing. An *attorney* is not ſubject to the juriſdiction of the county court of *Middleſex* [t]; but in *Weſtminſter* [u], and the *Tower-hamlets* [v], he is expreſsly ſubjected thereto. And in *Middleſex*, if he be ſued in a ſuperior court, for a debt under forty ſhillings, he may, according to a late determination [w], move the court to ſtay the proceedings.

By the *Weſtminſter* court of conſcience act, the mode preſcribed for a defendant to obtain his coſts is by *plea*; and if that mode be not adopted, the court will not, after verdict, enter a *ſuggeſtion* on the record, that the defendant lived within the juriſdiction, or ſtay the proceedings [x]. But in general, where the act is not pleaded, the proper mode is, for the defendant to apply to the court,

[t] 2 Wilſ. 42. Doug. *act.* 380. 3 Bur. 1583. *Semb. contra.*

[u] Doug. *act.* 380.

[v] Stat. 19 G. 3. c. 68. ſ. 24.

[w] 4 T. R. 495.

[x] 3 T. R. 452.

by

by affidavit, for leave to enter a ſuggeſtion on the roll, of the facts neceſſary to entitle him to the benefit of the act[y]: which ſuggeſtion may be traverſed or demurred to. And where the plaintiff demurred to the ſuggeſtion, which was adjudged againſt him, the coſts of the application were allowed, as well as of the trial and former proceedings[z]; though not, ſtrictly ſpeaking, coſts of the defence. But where the inqueſt is taken by default, there can be no ſuggeſtion on the roll[a]; for the defendant is out of court, as to all purpoſes, but that of having judgment againſt him.

Of coſts in actions for words.

By the 21 Jac. 1. c. 16. it is enacted, that "in all actions upon the caſe for ſlanderous words, to be ſued or proſecuted in any of the courts of record at Weſtminſter, or in any court whatſoever that hath power to hold plea of the ſame, if the jury upon the trial of the iſſue in ſuch action, or the jury that

[y] 1 Str. 47. 50. 2 Str. 1120. Barnes, 353. Say. Rep. 273. 2 Wilſ. 68.

[z] 2 Str. 1120. [a] 1 Str. 46.

ſhall inquire of the damages, do find or aſſeſs the damages under forty ſhillings, then the plaintiff or plaintiffs in ſuch action ſhall have and recover only ſo much coſts as the damages ſo given or aſſeſſed amount unto, without any further increaſe of the ſame; any law, ſtatute, or uſage to the contrary notwithſtanding." The operation of this ſtatute is confined to actions for ſlanderous words ſpoken of the *perſon*, and does not extend to actions for ſlander of *title* [b], &c. wherein the ſpecial damage is the giſt of the action: neither, for the ſame reaſon, does it extend to an action for ſpecial damage, in conſequence of words not in themſelves actionable [c]; though, where the words are actionable in themſelves, a ſpecial damage will not take the caſe out of the ſtatute [d]. This ſtatute applies to a writ of *inquiry*, as well as a *trial*, where the damages are under forty ſhillings [e]; and

[a] Cro. Car. 141. 163. 1 Str. 645.

[b] [c] 2 Ld. Raym. 831. 1 Salk. 206. 7 Mod. 129. S. C. Barnes, 135.

[d] 2 Ld. Raym. 1588. 2 Str. 936. S. C. Barnes, 132. 142. 3 Bur. 1683. 2 Blac. Rep. 1062. Caſ. Pr. C. B. 137. *contra*.

[e] 2 Str. 934.

a *juſtification* found for the plaintiff will not, in that event, entitle him to full coſts [f].

But the *principal* ſtatute, made for reſtraining the plaintiff's right to coſts, is the 22 & 23 Car. 2. c. 9. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 W. 3. c. 9.); by which it is enacted, that "in all actions of treſpaſs, aſſault and battery, and other perſonal actions, wherein the judge, at the trial of the cauſe, ſhall not find and certify under his hand, upon the back of the record, that an aſſault and battery was ſufficiently proved by the plaintiff againſt the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in queſtion; the plaintiff, in caſe the jury ſhall find the damages to be under the value of forty ſhillings, ſhall not recover or obtain more coſts of ſuit, than the damages ſo found ſhall amount unto." It ſeems to have been the intention of this ſtatute, Of the coſts in *treſpaſs*.

[f] Barnes, 128.

that the plaintiff ſhall have no more coſts than damages, in any perſonal action whatſoever, if the damages be under forty ſhillings, except in caſes of battery or freehold; and not even in theſe, without a certificate. And this conſtruction was adopted, in ſome of the firſt caſes that aroſe upon the ſtatute [g]. But a different conſtruction ſoon prevailed; and it is now ſettled, that the ſtatute is confined to actions of aſſault and battery; and actions for *local* treſpaſſes, wherein it is poſſible for the judge to certify, that the freehold or title of the land was chiefly in queſtion [h]. Therefore it does not extend to actions of debt, covenant, *aſſumpſit*, trover [i], or the like; or to actions for a mere aſſault [k]; or for criminal converſation [l], or battery of the plaintiff's ſervant [m], *per quod conſortium vel ſervitium amiſit.*

[g] 3 Keb. 121. 247.

[h] T. Raym. 487. T. Jon. 232. 2 Show. 258. S. C. 3 Mod. 39. 1 Salk. 208. 1 Str. 577. Gilb. Eq. Rep. 195. Barnes, 134. 3 Wilſ. 322. S. C. H. Black. 294.

[i] 3 Keb. 31. 1 Salk. 208.

[k] 3 T. R. 391.

[l] 3 Wilſ. 319.

[m] 3 Keb. 184. 1 Salk. 208. 1 Str. 192.

In

In actions for *local* treſpaſſes, the ſtatute applies, wherever an injury is done to the *freehold* [n], or to any thing *growing* [o] upon, or *affixed* [p] to, the freehold: and in a modern caſe [q] it was carried ſtill further. That was an action of treſpaſs *quare clauſum fregit:* the firſt count ſtated, that the defendants broke and entered the cloſe of the plaintiffs, and the graſs of the plaintiffs there then growing, with their feet in walking, trod down, ſpoiled, and conſumed; and dug up and got divers large quantities of turf, peat, ſods, heath, ſtones, ſoil and earth of the plaintiffs, in and upon the place in which, *&c.*; *and took and carried away the ſame*, and converted and diſpoſed of the ſame to their own uſe. There was

[n] 2 Vent. 48. Com. Rep. 19. 1 Salk. 208. 1 Str. 577. 633. 645. Gilb. Eq. Rep. 195. 2 Str. 726. 2 Ld. Raym. 1444. S. C.

[o] *Hill* v. *Reeves*, B. N. P. 330. Barnes, 144.

[p] *Birch* v. *Daffey*, B. N. P. 330. 1 Str. 633. Caſ. Pr. C. B. 86. Barnes, 121.

[q] Doug. *oct.* 779. And ſee 1 Str. 633. 645. Gilb. Eq. Rep. 197, S. S. C. 3 Bur. 1282. *accord.* But ſee 2 Vent. 215. Skin. 66. Com. Rep. 19. 1 Salk. 208. 1 Str. 192. *ſemb. contra.*

another count, upon a ſimilar treſpaſs, in another cloſe. The defendants pleaded the general iſſue to the *whole* declaration, and two ſpecial pleas to the *ſecond* count. And, on the trial, a verdict was found for the plaintiffs on the general iſſue, with one ſhilling damages; and for the defendants on the ſpecial pleas, and the judge had not certified. *Per lord Manſfield:* "The queſtion on this record is, whether the plaintiffs are entitled to any more coſts than damages, under the ſtatute 22 & 23 Car. 2. c. 9.? There is a puzzle and perplexity in the caſes on this part of the ſtatute, and a jumble in the reports; and as the queſtion is a general one, we thought it proper to conſult all the judges; and they are all of opinion, that this caſe is within the ſtatute, and that the plaintiffs ought to have no more coſts than damages. You will obſerve, that what has been called an *aſportavit* in this declaration, is a mode or qualification of the injury done to the land. The treſpaſs is laid to have been committed on the land by digging, &c. and the *aſportavit* as part of the ſame act; and,

and, on the trial of the iſſue, the freehold certainly *might* have come in queſtion. This is clearly diſtinguiſhable from an *aſportavit* of perſonal property, where the freehold cannot come in queſtion, and which therefore is not within the act. Thus, after trees are cut down, and thereby ſevered from the freehold, if a treſpaſſer comes and carries them away, that caſe is not within the ſtatute; becauſe the freehold cannot come in queſtion: here it might."

Where an injury is done to a *perſonal* chattel, it is not within the ſtatute [r]; nor where an injury to a perſonal chattel is laid, in the ſame declaration, with an aſſault and battery, or local treſpaſs [s]. And conſequently, in theſe caſes, though the damages be under forty ſhillings, the plaintiff is entitled to full coſts, without a certificate. But then it muſt

[r] 3 Keb. 389. 469. T. Jon. 232. 1 Salk. 208. 1 Str. 534. Gilb. Eq. Rep. 197. S. C.

[s] 3 Mod. 39. 1 Salk. 208. 1 Str. 192. 551. Gilb. Eq. Rep. 197. S. C. Barnes, 119, 120. 134. 3 Wilſ. 322. S. C. 2 Str. 1130. Say. Coſts, 39.

be a ſubſtantive and independent injury: for where it is laid, or proved, merely in aggravation of damages, as a mode or qualification of the aſſault and battery, or local treſpaſs [t], or there is a verdict for the defendant, upon that part of the declaration which charges him with an injury to a perſonal chattel [u], it is within the ſtatute. So where a *laceravit*, or tearing of the plaintiff's cloaths, is laid in the declaration [v], or found by the jury [w], to be merely in *conſequence* of an aſſault and battery, the plaintiff, recovering leſs than forty ſhillings damages, is not entitled to full coſts, without a certificate.

The certificate required by this ſtatute need not, it ſeems, be granted at the trial of the cauſe [*]. And where the defendant lets judgment go by default [x], or *juſtifies* the aſſault and battery, or pleads in ſuch a manner, as to bring the freehold or

[t] 1 Str. 624. *Ante*, 22.
[u] 2 Vent. 180. 195. Caſ. Pr. C. B. 118. [v] Say. Rep. 91.
[w] 1 T. R. 655. and ſee H. Black. 291.
[*] 11 Mod. 198. [x] B. N. P. 329.

title

title of the land in queſtion, on the face of the record, or a *view* is granted [y], a certificate is holden to be unneceſſary; as alſo, where, to a plea of a right of way, there is a replication of *extra viam* [z]. But where, in an action for an aſſault and battery, the defendant juſtifies the aſſault only [a], or an aſſault only is certified by the judge [b], the plaintiff, recovering leſs than forty ſhillings, is not entitled to more coſts than damages; though, in the latter caſe, to entitle him to full coſts, the judge may certify, on the 8 & 9 W. 3. c. 11. that the aſſault was wilful and malicious [c]. The *award* of an arbitrator is not tantamount to a judge's certificate, under the 22 & 23 Car. 2. c. 9. [d]

Where the plea or iſſue, though ſpecial, is *collateral* to the queſtion of freehold or title to the land, as where the

[y] 1 Ld. Raym. 76. 2 Salk. 665. S. C.
[z] 2 Lev. 234. 2 Ld. Raym. 1444. 2 Str. 726. S. C. *Id.* 1168. Say. Rep. 251.
[a] 3 T. R. 391. [b] 2 Lev. 102.
[c] 3 Wilſ. 326. [d] 3 T. R. 138.

defendant

defendant justifies an entry as bailiff under process, and issue is joined upon the door's being shut [e], or where, upon a plea of a distress for rent, there is an issue on the defendant's being bailiff [f], a certificate is necessary, to entitle the plaintiff to full costs: and it is also necessary, where the plaintiff recovers less than forty shillings damages, on a plea of not guilty to a new assignment [g]. But where the plaintiff is entitled to costs upon the new assignment, he is entitled to the costs of all the previous pleadings [h].

None of the statutes, made for restraining the plaintiff's right to costs, extend to actions brought in an *inferior* court, and removed by the defendant into a *superior* one [i]: and it has been holden, that the 21 Jac. 1. c. 16.[k] and the 22 & 23 Car. 2. c. 9.[l] only restrain the *court* from

[e] 2 Barnard. K. B. 277. [f] Say. Rep. 250.
[g] Barnes, 124. 129. S. C. *Id.* 149. B. N. P. 330.
[h] 1 T. R. 636.
[i] 2 Lev. 124. 4 Mod. 378, 9. 1 Ld. Raym. 395. Cas. Pr. C. B. 45. (*a*).
[k] 1 Salk. 207. [l] Cas. Pr. C. B. 45.

award-

awarding more coſts than damages; but the *jury*, not being reſtrained thereby, may give what coſts they pleaſe.

Of coſts, on the 4 & 5 W. & M. c. 23.

The reſtraint put upon the plaintiff's general right to coſts, by the 22 & 23 Car. 2. c. 9. has been ſince *partly* taken off, by ſubſequent ſtatutes. Thus, by the ſtatute 4 & 5 W. & M. c. 23. § 10. after reciting, that great miſchiefs enſue by inferior tradeſmen, apprentices, and other diſſolute perſons, neglecting their trades and employments, who follow hunting, fiſhing, and other game, to the ruin of themſelves and damage of their neighbours, it is enacted, that "if any ſuch perſon ſhall preſume to hunt, hawk, fiſh, or fowl (unleſs in company with the maſter of ſuch apprentice, duly qualified by law), ſuch perſon ſhall be ſubject to the penalties of this act, and ſhall or may be ſued or proſecuted for his wilful treſpaſs, in ſuch his coming on any perſon's land; and if found guilty thereof, the plaintiff ſhall not only recover his damages thereby ſuſtained, but his *full* coſts of ſuit; any former law to the contrary

trary notwithſtanding." It has been holden, that a *clothier* is an inferior tradeſman, within the meaning of this ſtatute [m]; and it is ſaid, that the words "*inferior tradeſmen*" extend to every tradeſman who is not qualified to kill game [m]: but this was doubted in a ſubſequent caſe [n], wherein the judges were divided in opinion, upon the queſtion, whether a *ſurgeon* and *apothecary* ſhould be conſidered as an inferior tradeſman.

Of coſts, on the 8 & 9 W. 3. c. 11.

So, by the 8 & 9 W. 3. c. 11. § 4. for the preventing of wilful and malicious treſpaſſes, it is enacted, that "in all actions of treſpaſs, to be commenced or proſecuted in any of his majeſty's courts of record at Weſtminſter, wherein at the trial of the cauſe it ſhall appear, and be certified by the judge under his hand, upon the back of the record, that the treſpaſs, upon which any defendant ſhall be found guilty, was *wilful* and *malicious*, the plaintiff ſhall recover not only his damages, but his *full* coſts of ſuit;

[m] Barnes, 125.

[n] 2 Wilſ. 70. Say. Coſts, 54. S. C.

any

any former law to the contrary notwithſtanding." The certificate, required by this ſtatute, need not be granted at the trial of the cauſe [o]; and it is ſaid, that the ſtatute extends to every treſpaſs, that is not accidental as well as trifling [p].

I ſhall next proceed to conſider in what caſes the plaintiff is entitled to coſts, where there are ſeveral *counts* or *pleas*, the iſſues upon which are ſome of them found for the plaintiff, and ſome for the defendant.

Of the coſts on ſeveral *counts*.

In the *common pleas*, where the declaration conſiſts of ſeveral counts, and the plaintiff ſucceeds upon any one of them, he is entitled to the coſts of the *whole* declaration [q]; though the defendant ſucceed upon the other counts. But it is otherwiſe in the *king's bench*; for there, neither party is allowed coſts, as to thoſe counts, the iſſues upon which are found

[o] *Swinnerton* v. *Jarvis*, E. 22 G. 3. C. P. 1 T. R. 636. K. B. but ſee 2 Wilſ. 21. Doug. 108. n. *contra*.

[p] 6 Mod. 153.

[q] B. N. P. 335. 2 Blac. Rep. 800. 1199.

for

for the defendant[r]. In the latter court, where the plaintiff's declaration conſiſted of two counts, to one of which the defendant pleaded the general iſſue, which was found for the plaintiff, and to the other a juſtification, to which the plaintiff demurred, and judgment was thereupon given for the defendant; the court agreed, that the defendant could have no coſts upon the demurrer[s]. But if there be two diſtinct cauſes of action, in two ſeparate counts, and as to one the defendant ſuffers judgment to go by default, and as to the other takes iſſue, and obtains a verdict, he is entitled to judgment for his coſts on the latter count, notwithſtanding the plaintiff is entitled to judgment and coſts on the firſt count[t].

Of the coſts of *double* pleading.

By the ſtatute for the amendment of the law, (4 Ann. c. 16. § 4, 5.) it is enacted, that "it ſhall and may be lawful for any defendant or tenant in any

[r] Say. Coſts, 212. Doug. *oct.* 677. but ſee 1 Wilſ. 331.

[s] Say. Coſts, 211. 2 Bur. 1232. S. C. *Tamen quære*, and ſee the ſtat. 8 & 9 W. 3. c. 11. § 2.

[t] 3 T. R. 654.

action

action or ſuit, or for any plaintiff in *replevin*, in any court of record, with the leave of the ſame court, to plead as many ſeveral matters thereto, as he ſhall think neceſſary for his defence."

"Provided nevertheleſs, that if any ſuch matter ſhall, upon a demurrer joined, be judged inſufficient, coſts ſhall be given at the diſcretion of the court; or if a verdict ſhall be found, upon any iſſue in the ſaid cauſe, for the plaintiff or demandant, coſts ſhall be alſo given in like manner, unleſs the judge, who tried the ſaid iſſue, ſhall certify, that the ſaid defendant or tenant, or plaintiff in *replevin*, had a probable cauſe to plead ſuch matter, which upon the ſaid iſſue ſhall be found againſt him."

"The certificate upon this ſtatute is not required to be made in court, at the trial of the cauſe[u]; and, where the judge refuſes to grant it, the court have not a diſcretionary power, whether they will

[u] Barnes, 141.

allow

allow the defendant *any* coſts at all; but are bound by the ſtatute to allow him *ſome* coſts, though the *quantum* is left to their diſcretion [v]. The intention of the legiſlature was, that if there be ſeveral matters pleaded, ſome of which are found for the plaintiff, he ſhall be entitled to the coſts of thoſe [w], notwithſtanding other matters are found for the defendant, which entitle him to judgment upon the whole record; unleſs the judge, before whom the cauſe was tried, ſhall certify, that the defendant had a probable cauſe to plead the matters which are found againſt him. That this is the true conſtruction of the ſtatute, will appear from the following caſes.

In *treſpaſs*, the defendant pleaded not guilty and ſeveral juſtifications; upon

[v] Barnes, 140. 2 T. R. 394, 5.

[w] In *Sayer*'s Law of Coſts, p. 223. it is ſaid, he ſhall have the coſts not only of *thoſe* matters, but alſo of the *others*, notwithſtanding they are found for the defendant. But this ſeems to be a miſtake; for the defendant, being entitled to judgment upon the matters found for him, is conſequently entitled to the coſts of them.

the

the trial, the plaintiff not proving his poſſeſſion of the *locus in quo*, the defendant had a verdict; and, by direction of *Deniſon*, J. the verdict was entered upon the general iſſue only; upon which there was a motion for a *venire de novo:* but the court refuſed the motion, ſaying, the verdict was complete, and determined the cauſe; that the plaintiff was not entitled to damages, though, they ſaid, he might have inſiſted to have a verdict entered on the other iſſues, for the ſake of *coſts*, which he would be entitled to, unleſs the judge certified, that the defendant had probable cauſe to plead ſuch plea [x]. But where the defendant, in *treſpaſs*, pleaded *three* different juſtifications, to three different counts, and, on iſſue joined, had a verdict for him on *two*, and againſt him on the *third*; on motion, this was holden not to be a caſe within the act, and that the plaintiff was entitled to coſts at common law, on the *whole* declaration [y].

[x] B. N. P. 335.

[y] *Id. ibid.* but note, this was in the common pleas.

Where the defendant pleads not guilty, and a juſtification to which the plaintiff demurs, and the plaintiff has judgment on the demurrer, but is nonſuited on the plea of not guilty, he ſhall nevertheleſs be allowed the coſts of the demurrer, which ſhall be deducted out of the coſts allowed to the defendant [z]. And if one of ſeveral pleas, pleaded by defendant, be adjudged bad, on a demurrer to plaintiff's replication, the plaintiff is entitled to have the coſts of thoſe pleadings deducted, from the coſts taxed for the defendant upon the *poſtea*, if afterwards, upon the trial of the iſſues joined on the other pleas, the defendant ſhould have a verdict; even though it ſhould appear, on the whole of the record, that the plaintiff had no cauſe of action [a]. But if the plaintiff take iſſue on ſeveral pleas, one of which is *inſufficient* in law, and has a verdict on all the iſſues, except that joined on the inſufficient plea, which is found for the defendant, and afterwards judgment is en-

[z] Barnes, 136. [a] 2 T. R. 391.

tered

tered for the plaintiff, ſtill he ſhall not be allowed any coſts, upon the iſſue found for the defendant [b]. And it has been reſolved, at a meeting of all the judges, that if there be a certificate upon the 43 Eliz. the plaintiff ſhall not have the coſts of any plea, pleaded with leave of the court; although the iſſue thereupon joined be found for him, and the judge have not certified, that the defendant had a probable cauſe for pleading the matter therein pleaded [c].

In *crim. con.* the defendant pleaded two pleas, *viz.* not guilty, and not guilty within *ſix* years; on the former, the plaintiff joined iſſue, and obtained a verdict, but to the latter there was a demurrer, and judgment againſt him; and it was holden, that the defendant ſhould have the coſts of the demurrer, but, upon the trial, there ſhould be no coſts on either ſide [d].

The

[b] 1 T. R. 266. but ſee Barnes, 133.

[c] Say. Rep. 260.

[d] 2 Bur. 753. 2 Wilſ. 85. S. C. The authority of this caſe ſeems to be queſtionable, as to the coſts of the

The *avowant* or defendant in replevin, though not within the words, is plainly within the meaning, of the ſtatute 4 Ann. c. 16. And accordingly, where ſome iſſues in replevin are found for the plaintiff, which entitle him to judgment, and ſome for the defendant, the latter muſt be allowed the coſts of the iſſues found for him, out of the general coſts of the verdict; unleſs the judge certify, that the plaintiff had a probable cauſe for pleading the matters, on which thoſe iſſues are joined[f]: and the general rule is ſaid to be this, where ſeveral matters are pleaded by the plaintiff, ſome of which are found for him, and others for the defendant, ſo that the plaintiff is entitled to judgment; if the judge who tried the cauſe certify, that there was a probable cauſe for pleading thoſe pleas, the maſter is

trial, from a ſimilar one that was differently determined, in the court of common pleas, (Barnes, 141.) as well as from the reaſoning that prevailed in ſeveral of the foregoing caſes.

[f] 2 T. R. 235.

not

not to deduct the coſts of the iſſues ſo found for the defendant, but if there be no certificate, the defendant is entitled to have thoſe coſts deducted for him [g].

Of the *defendant's* right to coſts.

It has already been obſerved [h], that no coſts were recoverable by a *defendant* at common law: and the reaſon ſeems to be, that if the plaintiff failed in his ſuit, he was amerced to the king *pro falſo clamore*, which was thought to be a ſufficient puniſhment, without ſubjecting him to the payment of coſts. The firſt inſtance of coſts being given to a defendant, was in a writ of right of *ward*, by the ſtatute of *Marlberge*, (52 Hen. 3.) c. 6. Afterwards, coſts were given to the defendant in *error*, by the 3 Hen. 7. c. 10. and in *replevin*, by the 7 Hen. 8. c. 4. and 21 Hen. 8. c. 19, *&c.* But in one of theſe caſes, the defendant is to be conſidered as an actor; and in the

[g] 2 T. R. 237. and ſee Barnes, 141. 144. 146. Doug. *oct.* 708, 9. *in notis, accord.* [h] *Ante*, 2.

other of them, the provision is virtually for the benefit of the plaintiff in the original action [i].

Of the costs in *error*.

In *Error*, brought by the defendant *before* [k] execution, or by the plaintiff upon a judgment for the defendant, if the judgment be affirmed, the writ of error discontinued, or the plaintiff in error nonsuited, the defendant in error is entitled to costs, by the 3 Hen. 7. c. 10. and 8 & 9 W. 3. c. 11. § 2.; upon the former of which statutes it has been holden, that costs are recoverable in error, for the delay of execution, although none were recoverable in the original action [l]. By the 13 Car. 2. stat. 2. c. 2. § 10. if the judgment be affirmed after verdict, the plaintiff shall pay to the defendant in error, his *double* costs. And by the 4 Ann. c. 16. § 25. for preventing vexation, from suing out

[i] Say. Costs, 70.

[k] Cro. Jac. 636.

[l] Dyer, 77. Cro. Eliz. 617. 659. 5 Co. 101. S. C. Cro. Car. 145. 1 Str. 262. 2 Str. 1084. but see Cro. Car. 425. 1 Lev. 146. 1 Vent. 38. 166. 4 Mod. 245. Carth. 261. S. C. *semb. contra.*

defective

defective writs of error, it is enacted, that "upon the quaſhing of any writ of error, for variance from the original record, or other defect, the defendant ſhall recover againſt the plaintiff in error his coſts, as he ſhould have had, if the judgment had been affirmed, and to be recovered in the ſame manner [m]:" which coſts include thoſe of the motion, for quaſhing the writ of error [n]. And though no coſts were recoverable in the original action, they are payable, on quaſhing a writ of error [o]. But where the defendant in error enters continuances, to defeat the writ of error, the plaintiff in error is not liable to coſts, on quaſhing it [p]. And none of the ſtatutes before mentioned give coſts, upon the *reverſal* of a judgment [q].

Of the coſts in *replevin*, &c.

In *Replevin*, or ſecond deliverance, the defendant, making avowry, cognizance, or juſtification, for rents, cuſtoms, or ſer-

[m] 2 Str. 834. Caſ. *Temp.* Hardw. 137.
[n] 2 Ld. Raym. 1403. 1 Str. 606. 8 Mod. 316. S. C.
[o] 1 Str. 262.
[p] 1 Str. 139. 2 Str. 834. Barnes, 250.
[q] 1 Str. 617.

vices, or for damage feaſant, is entitled to coſts, by the 7 Hen. 8. c. 4. and 21 Hen. 8. c. 19. § 3. if the avowry, cognizance, or juſtification be found for him, or the plaintiff be nonſuit, or otherwiſe barred: which ſtatutes extend to avowries, *&c.* made by an *executor* [r], or for an *eſtray* [s], and, as it ſhould ſeem, for an *amercement* by a court leet [t]; but not to pleas of *priſel en auter lieu*, upon which the writ is abated [u], or to pleas of *property* in the thing diſtrained [v]. By the 17 Car. 2. c. 7. § 2. the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods diſtrained, is alſo entitled to his *full* coſts of ſuit. And by the 11 Geo. 2. c. 19. § 22. if the defendant avow, or make cognizance, according to that ſtatute, upon a *diſtreſs* for rent, relief, heriot, or other ſervice, and the plaintiff be nonſuit, diſcontinue his action, or have judgment againſt him, the defendant ſhall recover *double* coſts of ſuit. But this latter

[r] 2 Rol. Rep. 437. [s] Cro. Eliz. 330.
[t] Cro. Jac. 520. but ſee Cro. Eliz. 300. *ſemb. contra.*
[u] Com. Rep. 122. [v] Hardr. 153.

ſtatute

ſtatute does not extend to a *ſeizure* for a heriot *cuſtom* [w].

At length, by the ſtatute 23 Hen. 8. c. 15. § 1. it was enacted, that "in treſpaſs upon the ſtatute 5 Rich. 2. debt, covenant, detinue, account, treſpaſs on the caſe, or upon any ſtatute for an offence or wrong perſonal, immediately ſuppoſed to be done to the plaintiff, if the plaintiff, after the appearance of the defendant, be nonſuited, or a verdict paſs againſt him, the defendant ſhall have judgment to recover his coſts againſt the plaintiff, to be aſſeſſed and taxed by the diſcretion of the judge or judges of the court, where ſuch action ſhall be commenced or ſued; and ſhall have ſuch proceſs and execution, for the recovery of the ſame, againſt the plaintiff, as the plaintiff ſhould or might have had againſt the defendant, in caſe judgment had been given for the plaintiff." Of coſts, on the 23 H. 8. c. 15.

But by § 2. of the ſame ſtatute, it is provided, that "every *poor* perſon, being

[w] Barnes, 148.

plaintiff

plaintiff in any ſuch action, who at the commencement of his ſuit ſhall be admitted, by the diſcretion of the judge or judges where the action is purſued, to have his proceſs and counſel of charity, without paying money or fee for the ſame, ſhall not be compelled to pay any coſts, by virtue of this ſtatute; but ſhall ſuffer other puniſhment, as by the diſcretion of the juſtices, before whom the ſuit ſhall depend, ſhall be thought reaſonable."

Of *paupers.* A *pauper* or *poor* perſon, in the eye of the law, is one who will ſwear that he is not worth ten pounds, after all his debts are paid, except his wearing apparel, and the ſubject matter of the action [x]; and ſuch a one may, upon petition, and affidavit of his extreme poverty, ſupported by a certificate of his cauſe of action, be admitted to ſue *in formâ pauperis:* which admiſſion may be either at the commencement of the ſuit, or afterwards *pendente lite* [y]. And upon his being ſo

[x] 2 Lil. P. R. 633.
[y] Say. Coſts, 90. 3 Wilſ. 24.

admitted, an attorney and counſel ſhall be aſſigned him, purſuant to the ſtatute 11 Hen. 7. c. 12.; and he ſhall be permitted to carry on the proceedings *gratis*, without uſing ſtamps [z], or paying fees to the officers of the court, unleſs he obtain a verdict for more than ten pounds, and then the officers ſhall be paid their court fees, and for paſſing the record, *&c.* Neither, as we have juſt ſeen, is a pauper liable to pay coſts to the defendant, if he be nonſuited, or have a verdict againſt him; but ſhall ſuffer other puniſhment at the diſcretion of the juſtices. It has been ſaid, that if a pauper be nonſuited, he ſhall pay coſts or be whipped [a]: but this puniſhment does not appear to have been ever inflicted [b]. If the pauper do not proceed to trial according to notice, or otherwiſe miſbehave himſelf, the court will order him to be diſpaupered [c]: but until this be done, they will not

[z] Stat. 5 W. & M. c. 21. § 14, &c.

[a] 1 Sid. 261. 2 Salk. 506. 7 Mod. 114.

[b] *Id. ibid.*

[c] 2 Lil. P. R. 633. 2 Salk. 506. 2 Str. 1122.

make

make any rule about coſts [d]. And, unleſs the pauper's conduct appear to have been vexatious, the court will not ſtay the proceedings in a ſecond action, until the coſts are paid, of a nonſuit in a prior one, for the ſame cauſe [e]: nor, if the pauper ſhould ſucceed in the ſecond action, will they deduct the coſts of the firſt, out of thoſe recovered in the ſecond [f].

Of *executors* and *adminiſtrators*.

Executors and *adminiſtrators* are not particularly excepted out of the ſtatute 23 Hen. 8. c. 16. yet, as that ſtatute only relates to contracts made with, or wrongs done to the plaintiff [g], it has been uniformly holden [h], that they are not liable to coſts, upon a nonſuit or verdict, where they neceſſarily ſue in their repreſentative character, and cannot bring the action in their own right; as upon a

[d] 2 Str. 878. 3 Wilſ. 24. but ſee Caſ. Pr. C. B. 47. 1 Str. 420. *ſemb. contra.*

[e] 2 Str. 878. 1121. 3 Wilſ. 24. but ſee 2 T. R. 511.

[f] 2 Str. 891. [g] 2 Str. 1107.

[h] Cro. Eliz. 503. Cro. Jac. 229. 2 Bulſt. 261. 1 Salk. 207. 314. 3 Bur. 1586. Say. Coſts, 97.

contract

contract entered into with the teſtator or inteſtate [i], or for a *wrong* done in his lifetime [k]. But where the cauſe of action ariſes after the death of the teſtator or inteſtate, and the plaintiff may ſue thereon in his own right, he ſhall not be excuſed from the payment of coſts, though he bring the action as executor or adminiſtrator; as upon a *contract* [l], expreſs or implied, or in *trover* [m] for a converſion, after the death of the teſtator or inteſtate. An executor or adminiſtrator is liable to coſts, upon a judgment of *non pros* [n]: and where he has *knowingly* brought a wrong action, or otherwiſe been guilty of a *wilful* default, he ſhall pay coſts upon a diſcontinuance [o], or for not pro-

[i] T. Jon. 47. 2 Ld. Raym. 1414. 1 Str. 682. S. C. Caſ. Pr. C. B. 157. Pr. Reg. 118. S. C. Barnes, 141.

[k] Barnes, 129.

[l] 6 Mod. 91. 181. 1 Salk. 207. S. C. 1 Ld. Raym. 436. 1 Str. 682. Barnes, 119. 2 Str. 1106. 4 T. R. 277.

[m] Com. Rep. 162. Caſ. Pr. C. B. 61. Barnes, 132. Caſ. *Temp.* Hardw. 204. But ſee 3 Lev. 60. *ſemb. contra.*

[n] Caſ. Pr. C. B. 14. 157, 8. 3 Bur. 1585.

[o] Caſ. Pr. C. B. 79. 3 Bur. 1451. 1 Blac. Rep. 451. S. C.

ceeding

ceeding to trial according to notice [p]; but otherwiſe he is not liable to coſts, in either of theſe caſes [q]. Nor, where he merely ſues *en auter droit*, is he liable to coſts, upon a judgment as in caſe of a nonſuit [r].

Of coſts, on the 8 Eliz. c. 2.

The ſtatute 23 Hen. 8. c. 15. only relates to caſes where the plaintiff is nonſuited, or has a verdict againſt him. But by the ſtatute 8 Eliz. c. 2. "upon proceſs iſſuing out of the court of king's bench, if the plaintiff do not declare in three days after bail put in, or if after declaration he do not proſecute his ſuit with effect, but willingly ſuffer the ſame to be delayed or diſcontinued, or he be nonſuited therein, the judges, by their diſcretions, ſhall award to the defendant his coſts, damages, and charges in that behalf ſuſtained." This ſtatute does not extend, any more than the former, to actions brought by executors and admi-

[p] Caſ. Pr. C. B. 158. 3 Bur. 1585.
[q] 2 Str. 871. Barnes, 133. 4 Bur. 1927.
[r] 4 Bur. 1928.

niſtrators,

nistrators [s], in their representative character. But if the plaintiff enter a *nolle prosequi*, the defendant is entitled to costs upon this statute [t].

Of the defendant's costs in a *popular* action.

The plaintiff, we may remember, is not entitled to costs in a *popular* action, for the whole or part of a penalty, given by statute to a common informer, unless they are expressly given him by the statute [u]. Nor was the defendant entitled to costs, in such an action, until the statute 18 Eliz. c. 5. § 3. (made perpetual by the 27 Eliz. c. 10.) by which it is enacted, that "if any common informer shall willingly delay his suit, or shall discontinue or be nonsuit, or shall have the matter pass against him therein by verdict or judgment in law, the said informer shall pay to the defendant his costs, charges, and damages, to be assigned by the court in which the suit shall be attempted:" with a proviso, that "this act shall not extend to any officer

[s] Cro. Eliz. 69. Cro. Jac. 361.
[t] 3 T. R. 511. [u] *Ante.*

who,

who, in reſpect of his office, has heretofore uſually ſued upon penal laws; nor to any officer ſuing only for matters concerning his office [v]." This law extends to actions brought upon a *ſubſequent* ſtatute [w], or one that is *repealed* [x]; and alſo to actions *qui tam*, for *part* of a penalty, as well as where the *whole* is given to a common informer [y]: but it does not extend to actions, brought by the party grieved, upon a *remedial* ſtatute [z].

Of coſts, on the 4 Jac. 1. c. 3.

There being ſtill many caſes, in which the defendant was not aided by the proviſions of the before-mentioned ſtatutes [a], it was enacted by the ſtatute 4 Jac. 1. c. 3. that "if any perſon ſhall commence in any court, any action of treſpaſs, *ejectione firmæ*, or any *other* action whatſoever, wherein the plaintiff or demandant might have coſts, in caſe judgment ſhould be

[v] 2 Ld. Raym. 1333. B. N. P. 334.
[w] 1 Wilſ. 177.
[x] Hutt. 35, 6. 2 Keb. 106. [y] Cowp. 366.
[z] 1 And. 116. 2 Leon. 116. 4 Leon. 55. Cro. El. 177. Hutt. 22. 1 Saik. 30.
[a] 2 Leon. 9. 3 Leon. 92. B. N. P. 334.

given

given for him, and the plaintiff ſhall be nonſuited therein, after the appearance of the defendant, or a verdict ſhall paſs againſt him by lawful trial, that then the defendant, in every ſuch action, ſhall have judgment to recover his coſts againſt the plaintiff or demandant, to be aſſeſſed and levied in like manner as upon the 23 Hen. 8. c. 15." By this ſtatute the defendant is entitled to coſts, on a nonſuit or verdict, in all caſes where the plaintiff would have been entitled to them, if he had obtained judgment. And though the declaration be inſufficient, ſo that the plaintiff could not have had coſts thereon, the defendant is nevertheleſs entitled to coſts, for the unjuſt vexation [b].

Of the coſts on a *nonpros.*

By the 13 Car. 2. ſtat. 2. c. 2. § 3. it is enacted, that "upon an appearance entered for the defendant, by attorney, of the term wherein the proceſs is returnable, unleſs the plaintiff ſhall put

[b] Moor, 625. 1 Bulſt. 189. 3 Bulſt. 248. Hob. 219. Hutt. 16. S. C. Cro. Car. 175. But ſee Cro. Jac. 158, 9. *ſemb. contra.*

into the court, from whence the proceſs iſſued, his bill or declaration againſt the defendant, in ſome perſonal action, or ejectment of farm, before the end of the term next following after appearance, a nonſuit for want of a declaration may be entered againſt him; and the defendant ſhall have judgment, to recover coſts againſt the plaintiff, to be taxed and levied in like manner as upon the 23 Hen. 8. c. 15."

Of coſts for the defendant on *demurrer*.

And ſtill further to diſcourage the bringing of frivolous and vexatious actions, it is enacted by the ſtatute 8 & 9 W. 3. c. 11. § 2. that "if any perſon ſhall commence or proſecute any action, in any court of record, wherein upon *demurrer*, either by plaintiff or defendant, demandant or tenant, judgment ſhall be given by the court againſt the plaintiff or demandant, the defendant or tenant ſhall have judgment to recover his coſts, and have execution for the ſame by *capias ad ſatisfaciendum*, *fieri facias*, or *elegit*." This ſtatute does not extend to demurrers

rers to pleas in abatement [c]; nor in any action, wherein the defendant would not have been entitled to costs, upon a nonsuit or verdict [d].

Of costs, where there are *several* defendants.

Where there are several defendants, who succeed in the action, the plaintiff may pay costs to which of them he pleases [e]: and if they fail, each of them is answerable for the whole costs. Thus, where an ejectment was brought against several defendants, who defended severally, and at the assizes one of them confessed lease entry and ouster, and had a verdict against him, but the others did not confess; the court upon application said, the officer must tax the same costs against all the defendants; and that if the plaintiff, after he had satisfaction against one, should take out execution against another, the latter might apply to the court [f].

[c] 1 Ld. Raym. 337. 1 Salk. 194. 12 Mod. 195. Comb. 432. S. C. 2 Ld. Raym. 992. 1 Salk. 194. 6 Mod. 83. S. C.

[d] Cas. Pr. C. B. 25. *Id.* 4. *contra.*

[e] 1 Str. 516. 2 Str. 1203. [f] B. N. P. 335, 6.

Where one of ſeveral defendants lets judgment go by default, and the other pleads a plea which goes to the whole, and ſhews that the plaintiff had no cauſe of action, if this plea be found for the defendant who pleaded it, he ſhall have coſts; and being an abſolute bar, the other defendant ſhall have the benefit of it, and ſhall not pay coſts to the plaintiff [h]. But where the plea does not go to the whole, but is merely in *diſcharge* of the party pleading it, there the other party ſhall not have the benefit of it; but ſhall pay coſts, though it be found againſt the plaintiff [i].

Before the ſtatute 8 & 9 W. 3. c. 11. if one of ſeveral defendants was *acquitted*, he was not entitled to his coſts; the courts conſtruing the former acts to relate only to the caſe of a total acquittal, of all the defendants [k]. This being found

[h] Co. Lit. 125. Cro. Jac. 134. 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C. 2 Ld. Raym. 1372. 1 Str. 610. 8 Mod. 217. S. C. Caſ. Pr. C. B. 107. Pr. Reg. 102. S. C.

[i] *Id. ibid.* 1 Wilſ. 89. 3 T. R. 656.

[k] 2 Str. 1005. and ſee 1 Salk. 194.

incon-

inconvenient, it was enacted, by the ſame ſtatute, § 1. that "where ſeveral perſons ſhall be made defendants, to any action of treſpaſs, aſſault, falſe impriſonment, or *ejectione firmæ*, and any one or more of them ſhall be, upon the trial thereof, acquitted by verdict, every perſon ſo acquitted ſhall recover his coſts of ſuit, in like manner as if the verdict had been given againſt the plaintiff, and acquitted all the defendants; unleſs the judge, before whom the cauſe is tried, ſhall immediately after the trial thereof, in open court, certify upon the record under his hand, that there was a reaſonable cauſe for making ſuch perſon a defendant." This ſtatute is confined to the particular actions therein mentioned; and does not extend to an action of treſpaſs upon the *caſe* [l], nor conſequently to an action of *trover* [m]: neither does it extend to an action of *replevin* [n].

When a *feigned* iſſue is ordered by a court of *law*, whether it be in a civil or

Of the coſts of a *feigned* iſſue.

[l] 2 Str. 1005. [m] Barnes, 139.
[n] 3 Bur. 1284. 1 Blac. Rep. 355. S C.

criminal proceeding, the coſts always follow the verdict, and muſt be paid to the party obtaining it[o]. But when a feigned iſſue is ordered by a court of *equity*, the coſts do not follow the verdict, as a matter of courſe; but the finding of the jury is returned back, to the court which ordered it, and the coſts there are in the diſcretion of the court[o]. Where the iſſue is ordered by a court of law, on a rule for an information[p], or motion for an attachment[q], the coſts of the original rule, or motion, do not in general follow the verdict, but only the coſts of the feigned iſſue; which coſts are to be reckoned, from the time when the feigned iſſue was firſt ordered and agreed to[r]. Yet, where it was ordered, by the conſent rule, that the coſts ſhould abide the event of the iſſue, the court directed the *whole* coſts to be paid under it[s].

[o] *Still* and *Rogers*, 1 Lil. P. R. 344. *Per Holt*, Ch. J. Barnes, 130. 1 Wilſ. 261. 331. Say. Rep. 24. 1 Wilſ. 324. S. C.

[p] Say. Rep. 229. 1 Bur. 603.

[q] Say. Rep. 253. [r] 1 Bur. 604.

[s] 2 Bur. 1021.

Having

Having thus ſhewn, in what caſes the parties are entitled to coſts, I ſhall proceed to conſider, what coſts they are reſpectively entitled to, how they are taxed, and the means of recovering them, as between *party* and *party*; and ſhall then conclude, with the reſpective remedies for the recovery and taxation of coſts, as between *attorney* and *client*.

Of *double* and *treble* coſts.

Where the plaintiff recovers *ſingle* damages, he is only entitled to *ſingle* coſts; unleſs more be expreſsly given him by ſtatute. But if *double* or *treble* damages be given by ſtatute, in a caſe wherein *ſingle* damages were before recoverable, the plaintiff is entitled to *double* or *treble* coſts, although the ſtatute be ſilent reſpecting them [t]; as in an action upon the 2 Hen. 4. c. 11. *&c.* [u] In ſome caſes, *double* and *treble* coſts are expreſsly given to the plaintiff; as upon the game laws, by the ſtatute 2 Geo. 3. c. 19. § 5. and wherever a plaintiff is entitled to *double* or *treble* coſts, the coſts

[t] Say. Coſts, 228.

[u] *Ante*, 3.

given by the court *de incremento* are to be doubled or trebled, as well as thoſe given by the jury [v]. But double or treble coſts are not to be underſtood to mean, according to their literal import, twice or thrice the amount of ſingle coſts. Where a ſtatute gives *double* coſts, they are calculated thus: 1. the common coſts; and then *half* the common coſts. If *treble* coſts, 1. the common coſts; 2. half of theſe; and then half of the latter [w].

Double or treble coſts are alſo in ſome caſes expreſsly given to the defendant; as in actions againſt pariſh officers, by the 43 Eliz. c. 2. § 19. againſt juſtices of the peace, conſtables, *&c.* by the 7 Jac. 1. c. 5. for diſtreſſes for rents and ſervices, by the 11 Geo. 2. c. 19. § 21, 2. and againſt officers of the exciſe or cuſtoms,

[v] 2 Leon. 52. Cro. Eliz. 582. 3 Lev. 351. Carth. 297. 321. 2 Str. 1048. but ſee 1 T. R. 252.

[w] Table of coſts, *in principio*. This table is a valuable acquiſition to the profeſſion, as it exhibits a collection of bills of coſts, accurately drawn, and methodically arranged; by which the practiſer may not only know how to charge for his buſineſs, but may ſee beforehand in what manner it is to be done.

by

by the 23 Geo. 3. c. 70. § 34. and 24 Geo. 3. ſeſſ. 2. c. 47. § 35. In theſe, and ſuch like caſes, where it does not appear, on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general iſſue,) and there is no particular mode appointed for recovery of the coſts, the proper mode, after a nonſuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a ſuggeſtion on the roll [x]. And it cannot be done by rule of court [y], unleſs where the plaintiff moves for leave to diſcontinue on payment of coſts; in which caſe, the court may make it part of the rule, that he ſhall pay double or treble coſts [z]. But where a particular mode is appointed by ſtatute, for the recovery of double or treble coſts, as by the *certificate* of the judge who tried the cauſe, on the 7 Jac. 1. c. 5. there that

[x] 1 Str. 49, 50. Caſ. Pr. C. B. 16. Caſ. *Temp.* Hardw. 125. *Id.* 138. 2 Str. 1021. S. C. Say. Rep. 214. 3 Wilſ. 442.

[y] 1 Str. 50.

[z] 2 Str. 974. Caſ. *Temp.* Hardw. 125.

particular

particular mode muſt be obſerved [a]: ſo that if the judge certify, there is no need of a ſuggeſtion; and if he do not, it is uſeleſs, except where judgment goes by default [b].

Mode of *taxing* coſts, between party and party.

Coſts are taxed, as between party and party, by the *maſter* in the king's bench, or by one of the *prothonotaries* in the common pleas, upon a bill made out by the attorney for the party entitled; or more frequently, without a bill, upon a view of the proceedings: and if there have been any *extra* expences, which do not appear on the face of the proceedings, there ſhould be an affidavit made of ſuch expences, to warrant the allowance of them; which is called an affidavit of *increaſed* coſts [c]. It is uſual, among fair practiſers, to give notice to the oppoſite attorney, of the time when the coſts are intended to be taxed [d]; but

[a] 2 Vent. 45. Doug. *eſt.* 307, 8. but ſee Doug. *eſt.* 308. n.

[b] Caſ. *Temp.* Hardw. 138, 9.

[c] Imp. K. B. 348. [d] *Id.* 349.

in

in order to enforce it, there muſt be a rule to be preſent at taxing coſts: which rule is obtained from the clerk of the rules in the king's bench, or one of the ſecondaries in the common pleas, and ſhould be duly ſerved; after which, if the coſts are taxed without notice, the taxation is irregular, and the attorney liable to an attachment.

Means of *recovering* coſts, between party and party.

The means of recovering coſts, as between party and party, are by *action* or *execution*, upon a judgment obtained for them; or by *attachment*, upon a rule of court. Thus, in *ejectment*, where there is a verdict and judgment againſt the tenant, an action may be brought, or execution taken out thereon, for the coſts[e]: but where the plaintiff is nonſuited, for not confeſſing leaſe entry and ouſter, the leſſor of the plaintiff muſt proceed by attachment, upon the conſent rule[f]. And ſo where the nominal plaintiff is nonſuited upon the merits, or has a verdict and judgment againſt him, the only

[e] Run. Eject. 140, 141.

[f] *Id. ibid.* 1 Salk. 259. Barnes, 182.

remedy

remedy is by attachment, againſt the leſſor of the plaintiff [g].

In proceeding by *attachment*, a copy of the rule, with the officer's *allocatur* thereon, ſhould be *perſonally* [h] ſerved, on the party liable to the payment of coſts; and at the ſame time, the original rule ſhould be ſhewn to him [i], and a demand made of the payment of them [k]: which demand may be made by the acting attorney in the cauſe, although he act in the name of another attorney [l]. And if the coſts be not paid, the court, upon an affidavit of the circumſtances, will grant an attachment. In the king's bench, the rule for an attachment is abſolute in the firſt inſtance [m]; and may be moved for, on the laſt day of term [n].

Beſides the ordinary method of proceeding, there are certain *auxiliary* means

[g] Run. Eject. 142, 3. *Tilly* and *Baily*, Mich. 6 Geo. 2.
[h] 3 T. R. 351.
[i] *Id. ibid.*
[k] Barnes, 120.
[l] Say. Rep. 95.
[m] *Per Buller*, Juſt. M. 24 G. 3.
[n] 5 Bur. 2686.

for

for the recovery of coſts, as between party and party. Theſe means are by moving to ſtay the proceedings, until ſecurity be given for the payment of coſts, or until the coſts are paid of a former action for the ſame cauſe; or by deducting the coſts of one action, from thoſe of another.

Of ſtaying the proceedings, until ſecurity be given for payment of coſts.

In *ejectment*[o], and actions *qui tam*[p], where the plaintiff, or his leſſor, is *unknown* to the defendant, the latter may call for an account of his reſidence, or place of abode, from the oppoſite attorney; and if he refuſe to give it, or give in a fictitious account, of a perſon who cannot be found, the court will ſtay the proceedings, until ſecurity be given for the payment of coſts. And in *ejectment*, where the leſſor of the plaintiff is an *infant*[q], *dead*[r], or reſident *abroad*[s], the

[o] 1 Str. 681.

[p] *Id.* 697. 705. Barnes, 126.

[q] 1 Str. 694. 2 Str. 932. 1206. 1 Wilſ. 130. Cowp. 24. Barnes, 183. B. N. P. 111. but ſee Cowp. 128.

[r] Barnes, 147.

[s] 2 Bur. 1177. Say. Coſts, 153.

court

court will ſtay the proceedings, until a real and ſubſtantial plaintiff be named, or ſome reſponſible perſon undertake for the payment of coſts. A ſimilar undertaking is alſo required, in an action for the meſne profits, brought in the name of the nominal plaintiff in ejectment [t].

But except in *ejectment* [u], or actions *qui tam* [v], it was not formerly uſual to require ſecurity for coſts, where the plaintiff reſided abroad [w]: for it was conſidered, that ſuch a proceeding might affect trade, by excluding foreigners from our courts; and would be a means of clogging the courſe of juſtice. But now, although a plaintiff is not compellable to give ſecurity for coſts, merely as a foreigner, if he reſide in this country, yet whether he be a foreigner or native, if he reſide abroad, out of the reach of the proceſs of the court, the proceedings may

[t] Say. Rep. 78.

[u] 2 Bur. 1177. Say. Coſts, 153.

[v] 1 Str. 697. 2 Str. 1206. 1 Wilſ. 266.

[w] 2 Str. 1206. 1 Wilſ. 266. Say. Coſts, 155. 2 Bur. 1026. 4 Bur. 2105. Cowp. 24. 158.

be

be ſtayed, till his return, or ſecurity be given for the payment of coſts [x]. Theſe are the only grounds upon which the proceedings can be ſtayed, for want of ſecurity for coſts: it being holden, that they ſhall not be ſtayed, even in a *qui tam* action, merely on account of the plaintiff's poverty [y]; or in *ejectment*, where the leſſor of the plaintiff is known, of full age, and reſident in this country [z].

Of ſtaying the proceedings, until payment of coſts of a former action.

In a *ſecond* ejectment, the court will ſtay the proceedings, until the coſts are paid of a prior one, for the ſame cauſe [a]; and that whether it be brought in the ſame or a different court [b]. And where the defendant in ejectment brings a writ of error, before he has quitted poſſeſſion, the court will ſtay the proceedings, pending the writ of error [c]. But the

[x] 1 T. R. 267. 362. 491.
[y] Cowp. 24. Barnes, 126. [z] 1 T. R. 491.
[a] 1 Salk. 255. 1 Str. 548. 554. 2 Str. 1152. 1206. 1 T. R. 492. K. B. Pr. Reg. 174. Barnes, 133. 2 Blac. Rep. 304. 1158. 1180. C. B.
[b] *Id. ibid.*
[c] 1 Salk. 258, 9. and ſee 1 Str. 554.

vexation

vexation of the party is ſaid to be the ground of theſe rules [d]: and therefore, if the ſecond ejectment be brought by the defendant, or there appears to be no vexation, the court will not make a rule for ſtaying the proceedings, until the coſts are paid of the former ejectment [e].

In other caſes, it was not formerly uſual to ſtay the proceedings, in a ſecond action, until the coſts were paid of a prior one, for the ſame cauſe *; and particularly, if the merits did not come in queſtion, on the former trial [f]. But of late years, it has been done, in ſeveral inſtances, on the ground of vexation [g]: and in one caſe [h], where an action was brought by huſband and wife, the court ſtayed the proceedings, until the pay-

[d] 4 Mod. 379. 2 Str. 1152.

[e] 4 Mod. 379. 1 Str. 681. 2 Str. 1099. 1121. Barnes, 180.

* 2 Str. 1206. Cowp. 322. 1 T. R. 491, 2. K. B. Barnes, 125. C. B. but ſee 1 Vent. 100.

[f] 1 Ld. Raym. 697.

[g] 2 T. R. 511. K. B. Say. Coſts, 245. 247. 2 Blac. Rep. 741. 3 Wilſ. 149. S. C. C. B.

[h] *Lampley* & wife v. *Sands*, H. 25 G. 3. K. B.

ment of coſts in a former action, at the ſuit of the huſband only; it being for the ſame demand.

Of ſetting off coſts againſt coſts.

The practice of deducting or ſetting off the coſts in one action againſt thoſe in another, however agreeable to natural juſtice, does not ſeem to have obtained, till lately, in the court of king's bench [k]. But, in the court of common pleas, it has been frequently allowed; and that not only where the parties have been the *ſame* [l], but alſo where they have been in ſome meaſure *different*. Thus a party has been permitted to ſet off a *ſeparate* demand, for coſts payable to himſelf *alone*, againſt a *joint* demand, for coſts payable by himſelf and others [m]: and he has alſo been permitted to ſet off a *joint* demand, for coſts payable to himſelf and another, againſt a *ſeparate* demand, for damages and coſts payable by himſelf

[k] 2 Str. 891. 1203. B. N. P. 336. 4 T. R. 124.
[l] Barnes, 145. 2 Blac. Rep. 826. B. N. P. 336.
[m] Barnes, 146. but ſee Barnes, 130.

only [n]. But where, in an action of trespass against four defendants, the plaintiff obtained a verdict against one, and the other three were acquitted, the court would not suffer the costs of the three defendants, who were acquitted, to be deducted out of the plaintiff's costs, against that defendant who was found guilty; declaring the motion to be unprecedented [o].

Where the application is made by the party to whom the *larger* sum is due, the rule is for a stay of proceedings, on acknowledging satisfaction for the *lesser* sum [p]. But where the *lesser* sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings, on payment of the balance [q].

Remedies for the *recovery* and *taxation* of costs, as between attorney and client.

As between *attorney* and *client*, the former may maintain an action against

[n] Say. Costs, 254. 2 Blac. Rep. 827. S. C. cited.

[o] Barnes, 145. B. N. P. 336.

[p] B. N. P. 336.

[q] Say. Costs, 254. and see 4 T. R. 124.

the

the latter, for the recovery of his coſts [r]. But, by the ſtatute 3 Jac. 1. c. 7. § 1. "all attornies and ſolicitors ſhall give a true bill unto their maſters or clients, or their aſſigns, of all charges concerning the ſuits which they have for them, ſubſcribed with their hands and names, before ſuch time as they or any of them ſhall charge their clients, with any the ſame fees or charges." Upon this ſtatute it was a good plea, to an action brought by an attorney for his fees, that no bill had been delivered to the defendant [s]; or the ſtatute might have been given in evidence, on *non aſſumpſit* [t]. But if an attorney had delivered his bill to the defendant, after the arreſt and before the bill filed, it was well enough [u]: and this ſtatute did not extend to attornies in *inferior* courts, but only to thoſe in the courts at Weſtminſter [v]. It

[r] Cro. Car. 159, 160.

[s] 3 Keb. 118. 514. T. Raym. 245. 3 Salk. 19. S. C. but ſee Carth. 57. 1 Show. 48. Comb. 126. S. C.

[t] 1 Show. 338.

[u] 1 Lil. P. R. 145. but ſee 1 Str. 633. Caſ. Pr. C. B. 27. S. C.

[v] Carth. 147. 1 Show. 96. 1 Salk. 86. S. C.

ſhould alſo ſeem, that an attorney's bill could not have been taxed, unleſs an action was depending thereon, nor without bringing the amount of it into court. To remedy theſe manifold inconveniencies, it was enacted, by the ſtatute 2 Geo. 2. c. 23. § 23. (made perpetual by the 30 Geo. 2. c. 19. § 75.) that " no *attorney* of the court of king's bench, common pleas, or exchequer, *&c.* nor any *ſolicitor* in chancery, *&c.* ſhall commence or maintain any action or ſuit, for the recovery of any fees, charges, or diſburſements, at law or in equity, until the expiration of one month or more, after ſuch attorney or ſolicitor reſpectively ſhall have delivered, unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-houſe, or laſt place of abode, a bill of ſuch fees, charges, and diſburſements [w], written in a common legible hand, and in the Engliſh tongue, except law terms and names of writs, and in words at length, except times and

Delivery of bill of coſts.

[w] Barnes, 243. *Id.* 123.

ſums;

ſums; which bill ſhall be ſubſcribed, with the proper hand of ſuch attorney or ſolicitor reſpectively.

" And, upon application of the party or parties chargeable by ſuch bill, or of any other perſon in that behalf authorized, unto the lord high chancellor, or maſter of the rolls, or unto any of the courts aforeſaid, or unto a judge or baron of any of the ſaid courts reſpectively, in which the buſineſs contained in ſuch bill, or the greateſt part thereof in amount or value, ſhall have been tranſacted; and upon the ſubmiſſion of the ſaid party or parties, or ſuch other perſon authorized as aforeſaid, to pay the whole ſum, that upon taxation of the ſaid bill ſhall appear to be due, to the ſaid attorney or ſolicitor reſpectively; it ſhall and may be lawful for the ſaid lord high chancellor, maſter of the rolls, or any of the courts aforeſaid, or for any judge or baron of any of the ſaid courts reſpectively, and they are hereby required, to refer the ſaid bill, and the ſaid attorney's or ſolicitor's demand thereupon, although no action Taxing it.

or ſuit ſhall be then depending in ſuch court, touching the ſame, to be taxed and ſettled by the proper officer of ſuch court, without any money being brought into the ſaid court for that purpoſe: and if the ſaid attorney or ſolicitor, or the party or parties chargeable by ſuch bill reſpectively, having due notice, ſhall refuſe or neglect to attend ſuch taxation, the ſaid officer may proceed to tax the ſaid bill *ex parte*; pending which reference and taxation, no action ſhall be commenced or proſecuted, touching the ſaid demand.

Payment of the balance.

"And, upon the taxation and ſettlement of ſuch bill and demand, the ſaid party or parties ſhall forthwith pay to the ſaid attorney or ſolicitor reſpectively, or to any perſon by him authorized to receive the ſame, that ſhall be preſent at the ſaid taxation, or otherwiſe unto ſuch other perſon or perſons, or in ſuch manner, as the reſpective court aforeſaid ſhall direct, the whole ſum that ſhall be found to be or remain due thereon, which payment ſhall be a full diſcharge of

of the ſaid bill and demand: and in default thereof, the ſaid party or parties ſhall be liable to an attachment or proceſs of contempt, or to ſuch other proceedings, at the election of the ſaid attorney or ſolicitor, as ſuch party or parties was or were before liable unto.

Refunding money overpaid.

" And if, upon the ſaid taxation and ſettlement, it ſhall be found, that ſuch attorney or ſolicitor ſhall happen to have been overpaid, then the ſaid attorney or ſolicitor reſpectively ſhall forthwith refund, and pay unto the party or parties entitled thereunto, or to any perſon by him, her, or them authorized to receive the ſame, if preſent at the ſettling thereof, or otherwiſe unto ſuch other perſon or perſons, or in ſuch manner, as the reſpective court aforeſaid ſhall direct, all ſuch money as the ſaid officer ſhall certify to have been ſo overpaid; and in default thereof, the ſaid attorney or ſolicitor reſpectively ſhall, in like manner, be liable to an attachment or proceſs of contempt, or to ſuch other proceedings, at the election of the ſaid party or parties,

ties, as he would have been ſubject unto, if this act had not been made.

Coſts of taxation.

" And the ſaid reſpective courts are hereby authorized, to award the *coſts* of ſuch taxations to be paid by the parties, according to the event of the taxation of the bill; that is to ſay, if the bill taxed be leſs, by a *ſixth* part, than the bill delivered, then the attorney or ſolicitor is to pay the coſts of the taxation; but if it ſhall not be leſs, the court, in their diſcretion, ſhall charge the attorney or client, in regard to the reaſonableneſs or unreaſonableneſs of ſuch bill."

Abbreviations.

But, by the 12 Geo. 2. c. 13. § 5. " it ſhall and may be lawful to and for every attorney, clerk in court, and ſolicitor, to write his bill of fees, charges, and diſburſements, with ſuch *abbreviations* as are now commonly uſed in the Engliſh language; any thing in any former law to the contrary notwithſtanding."

And by § 6. " the ſaid act of the *ſecond* year of his preſent majeſty, for the

better regulation of attornies and ſolicitors, or any clauſe, matter, or thing therein contained, ſhall not extend to any bill of fees, charges, and diſburſements, due from any attorney or ſolicitor, to any other attorney or ſolicitor, or clerk in court; but that every ſuch attorney, ſolicitor, or clerk in court, may uſe ſuch remedies for the recovery of his fees, charges, and diſburſements, againſt ſuch other attorney or ſolicitor, as he might have done before the making of the ſaid act."

In what caſes an attorney's bill may be *taxed*, by his client.

Upon the latter clauſe, there is a caſe in *Wilſon* [x], where a judge of the court of king's bench having made an order, to refer an *agent*'s bill to be taxed, and the maſter not having obeyed it, the court was applied to, and held that the order was irregular; the maſter declaring, that he had never taxed a bill for agency. But it is now the uniform practice of both courts [y], to refer an agent's

[x] 1 Wilſ. 266.

[y] Doug. *edit.* 199, 200. and the caſes there cited *in notis*.

bill

bill to be taxed, upon the defendant's bringing into court the ſum claimed by the plaintiff. It is not neceſſary however, that ſuch a bill ſhould be ſigned, or delivered, before the commencement of an action [a].

If the whole bill be for *conveyancing* [a], or for buſineſs done at the quarter *ſeſſions* [b], *&c.* it cannot be taxed. But where an attorney had delivered two ſeparate bills, one of which was for fees and diſburſements in cauſes, and the other for making conveyances, a rule was made for taxing both [c]. And ſo, where it was moved, that the maſter might be directed to tax thoſe articles in an attorney's bill, which related to conveyancing and parliamentary buſineſs, the reſt being for management of cauſes in the court of king's bench, lord *Mansfield* ſaid, there was no doubt but the maſter might tax the whole: that he recollected a caſe,

[a] Doug. *oct.* 199. *in notis.*
[a] M. 12 G. 2. *Anon.* K. B. Barnes, 141, 2. C. B.
[b] 4 T. R. 124. K. B. Barnes, 122. C. B.
[c] Say. Rep. 233. Say. Coſts, 320. S. C.

where

where the fees paid to a proctor, for buſineſs done in the eccleſiaſtical court, made part of the bill; and it was determined, that, as the whole bill had been referred to the maſter, he might tax that part of it [d].

It is not neceſſary for the *executor* or *adminiſtrator* of an attorney, to deliver a bill of coſts, for buſineſs done by his teſtator or inteſtate, before the commencement of an action [e]; the ſtatute 2 Geo. 2. c. 23. § 23. being confined to actions brought by the attorney himſelf, and not extending to his perſonal repreſentatives. And, in the court of common pleas, they will not ſuffer ſuch a bill to be taxed [f]: but in the court of king's bench it is otherwiſe [g]; for there, the bill may be referred to be taxed, on the defendant's undertaking to pay what is due. An attorney delivered his bill, and, after his death, application was made to tax it, and above a ſixth part was taken off;

[d] Doug. *oct.* 199. *in notis.*
[e] Caſ. Pr. C. B. 58. [f] Barnes, 119. 122.
[g] 2 Str. 1056. Say. Coſts, 324, 5. Imp. K. B. 482.

it

it was moved that the executrix might pay the coſts, but the court held ſhe ſhould not, for the words of the act 2 Geo. 2. c. 23. § 23. impoſe them upon the attorney or ſolicitor only, and the executrix is not to blame, if ſhe ſtand upon his bill, or make out one from his books [h].

After an attorney's bill has been ſettled and paid, and the payment has been long acquieſced under, the court will not refer it to be taxed, *as a matter of courſe* [i]. So where a bond had been given for the debt, five years before, and the vouchers had been delivered up, the court would not refer the bill to be taxed, ſaying, an attorney at this rate could never be ſafe [k]. And it is a general rule, that an attorney's bill cannot be taxed, at the trial of an action brought upon it, nor after verdict [l]; for if the buſineſs was really done, (which muſt be proved

[h] 2 Str. 1056. Say. Coſts, 327.
[i] Say. Coſts, 323. Doug. *ed.* 199.
[k] Caſ. Pr. C. B. 109 Pr. Reg. 37. S. C.
[l] Doug. *ed.* 199. K B. Barnes, 124. C. B.

at

at the trial,) the delay of the defendant, for more than a month, in objecting to the *quantum*, is an admiſſion that he thinks it to be reaſonable. But though an attorney's bill has been ſettled and paid, yet the court, *under ſpecial circumſtances*, will refer it to be taxed; for the client may, by affidavit, ſhew, that the buſineſs charged was never performed, or that the charges are fraudulent: and where that is the caſe, neither payment, nor a releaſe, nor a judgment for the money due, will preclude the court from referring the bill to be taxed [m]. It may alſo be taxed, though there was a ſpecial agreement, between the attorney and his client, that the former ſhould be paid for his time, at a certain rate by the day, beſides his expences [n]; or though he has obtained a warrant of attorney from his client, for confeſſing judgment for the money due upon his bill, and has entered up judgment thereupon [o].

[m] Say. Coſts, 323. Doug. *oct.* 199. S. P.
[n] Say. Coſts, 321. [o] *Id.* 322.

The

The ſtatute 2 Geo. 2. c. 23. § 23. only requires the delivery of a bill, for the *bringing* of an action; and therefore, though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumſtance is not neceſſary to enable him to *ſet it off*. But he muſt not produce it at the trial by ſurprize. It is ſufficient, in ſuch caſe, to deliver it time enough, for the plaintiff to have it taxed before the trial [p].

Mode of taxing an attorney's bill, by his *client*.

If an attorney refuſe to deliver a bill to his client, the latter may compel him, by taking out a ſummons before a judge; and if the attorney, on being ſerved therewith, do not attend, an order will be made for delivering it, within a reaſonable time [q]. If he ſtill neglect to deliver it, the order ſhould be made a rule of court; and on ſerving the ſame, and making affidavit thereof, the court on motion will grant an attachment [q]. The bill being delivered, the client may apply

[p] Doug. *act.* 199. *in notis.*

[q] Imp. K. B. 479.

for

for a judge's ſummons, to ſhew cauſe, why it ſhould not be referred to the proper officer to be taxed; upon which an order will be made, the client undertaking to pay what ſhall appear to be due upon ſuch taxation [r]. If the attorney do not attend, an order will be made of courſe. But the client cannot have a ſummons for delivery of the bill, and taxing it, together [s]. It was formerly neceſſary, in the king's bench, to have three appointments, in caſe the attorney did not attend, before the maſter could proceed *ex parte*. But, by a late rule [t], it is ordered, that "on every appointment to be made by the maſter, the party on whom the ſame ſhall be ſerved, and required to attend, ſhall attend ſuch appointment, without waiting for a ſecond; or in default thereof, the maſter ſhall proceed *ex parte* on the firſt appointment."

If a ſixth part of the bill be taken off, the attorney is to pay the coſts of taxation; Of the *coſts* of taxation.

[r] Imp. K.B. 479, 480. [s] *Id.* 480. Barnes, 126. C.B.
[t] H. 32 Geo. 3. 4 T. R. 580.

ation; but if less, the costs are in the discretion of the court [u]. In the exercise of this discretion, however, the courts are governed by the statute: and accordingly, the costs of taxation have been always reciprocally given to the client or attorney, as a sixth part has, or has not been taken off [v].

Of an attorney's *lien* for his bill of costs.

To assist the attorney, in recovering his costs, he has a *lien* for the amount of his bill, upon the deeds, papers, and writings in his hands, belonging to his client [w]: and until that be paid, the court will not order them to be delivered up [x]. Nor can an attorney be *changed* by his client, without leave of the court, or order of a judge, on payment of his bill, to be taxed by the proper officer [y]. An attorney has also a *lien*, on the money recovered by his client, for his bill of costs [z]. If the money come to his hands, he may retain it, to the amount of his

[u] See the statute.
[v] Barnes, 118. 147, 8.
[w] 4 T. R. 124. Doug. *ed.* 104, 5. but see *Id.* 197. n.
[x] 1 Lil. P. R. 142. 3 T. R. 275.
[y] 1 Lil. P. R. 141. Doug. *ed.* 217.
[z] 4 T. R. 124.

bill:

bill: he may ſtop it *in tranſitu*, if he can lay hold of it: if he apply to the court, they will prevent its being paid over, till his demand is ſatisfied [a]. And lord *Mansfield* declared he was inclined to go ſtill further, and to hold, that if the attorney give notice to the defendant, not to pay the money recovered by his client, till his bill be ſatisfied, a payment by the defendant, after ſuch notice, would be in his own wrong, and like paying a debt which has been aſſigned, after notice [b]. So, in a late caſe [c], where the defendant applied to ſet off the debt and coſts in one action, againſt thoſe in another, the court would not ſuffer it to be done, until the attorney's bill was firſt diſcharged. But the court will not go beyond theſe limits. And therefore where the defendant, not having had any notice to the contrary, compromiſed the debt and coſts with the plaintiff, before his attorney had been paid, the court would not oblige the defendant to pay him [d].

[a] Doug. 100, 101.
[b] *Id.* 226, 7.
[c] 4 T. R. 123, 4.
[d] Doug. 226.

ADDENDUM.

IN page 25, a certificate is ſaid to be unneceſſary, on the ſtatute 22 & 23 Car. 2. c. 9. where, to a plea of a right of way, there is a replication of *extra viam*. But the contrary was determined, by the court of king's bench, in the caſe of *Cochran* v. *Harriſon*, T. 22 G. 3. of which the author has been favoured with a manuſcript note, ſince this work was printed off. That was an action of treſpaſs *quare clauſum fregit*, wherein the defendant pleaded not guilty, and a right of way, ſet out under an incloſure act, deſcribing it by metes and bounds. To the latter plea, the plaintiff replied *extra viam*; and iſſue being joined thereon, there was a verdict for the plaintiff, with 30s. damages and 30s. coſts. The judge not having certified, the court were unanimouſly of opinion, that the plaintiff was entitled to no more coſts than damages. And *Buller* Juſt. grounded his opinion on the former determinations being wrong; becauſe, after the replication of *extra viam*, the caſe was exactly the ſame, as if not guilty had been originally pleaded; and upon this iſſue the title could not have come in queſtion.

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